Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN AND CHARLENE GEEVER,

Appellants,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
DAVID E. BINDI *
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2239
Counsel for the Appellee

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 34240—55—9-30-88)

16 pp

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C. § 1257?

2. Whether this appeal fails to raise a substantial federal question meriting review in this Court at the present time, because the decision below is correct and is not in conflict with the decisions of any other state or federal court?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS	1
STATEMENT OF THE CASE	2
ARGUMENT:	
I.	
THIS COURT LACKS JURISDICTION BECAUSE THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257	3
II.	
THIS APPEAL FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW IN THIS COURT AT THE PRESENT TIME, BECAUSE THE DECISION BELOW IS CORRECT AND IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER STATE OR FEDERAL COURT	7
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Bateman v. Arizona, 429 U.S. 1302 (1976) (Rehnquist, J., Circuit Justice)	3
Bowers v. Hardwick, 106 S.Ct. 2841 (1986)	8
Calder v. Jones, 465 U.S. 783 (1984)	6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	3, 4, 5, 6
Davis v. O'Hara, 266 U.S. 314 (1924)	5
Ex Parte Felton, 526 So.2d 638 (Ala. 1988)	10
Flynt v. Ohio, 451 U.S. 619 (1981)	3, 4, 7
Hathorn v. Lovorn, 457 U.S. 255 (1982)	5
In Re Duncan, 189 Cal. App. 3d 1348, 234 Cal. Rptr. 877, *cert. denied*, 108 S.Ct. 501 (1987)	10
Miller v. California, 413 U.S. 15 (1973)	8
Mills v. Alabama, 384 U.S. 214 (1966)	4
National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)	6
New York v. Ferber, 458 U.S. 747 (1982)	8
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)	8
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	3
Reece v. Georgia, 350 U.S. 85 (1955)	5
Shaffer v. Heitner, 433 U.S. 186 (1977)	6
Southland Corp. v. Keating, 465 U.S. 1 (1984)	6
Stanley v. Georgia, 394 U.S. 557 (1969)	7, 8, 10

State v. Meadows, 28 Ohio St. 2d 43, 503 N.E.2d 697 (1986), *cert. denied*, 107 S.Ct. 1581 (1987) .. 10

United States v. 12 200-ft. Reels of Super 8 m.m. Film, 413 U.S. 123 (1973) 8

Other Authorities

Ill. Rev. Stat. 1985, ch. 38, par. 11-20.1(a) 2, 4, 9

Ala. Code § 13A-12-192(b) (1984) 10

Ariz. Rev. Stat. Ann. § 13-3553 (1985) 10

Fla. Ann. Stat. § 827.071(4) (1985) 10

Minn. Stat. Ann. § 617.247(4) (1983) 10

Nev. Rev. Stat. Ann. § 200.730 (1986) 10

Ohio Rev. Code Ann. § 2907.322(A)(5) (Baldwin 1986) 10

Okla. Stat. Ann. title 21, § 1021.2 (1987 Supp.) .. 10

S.D. Codified Laws, title 22-22-23.1 (1987 Supp.) .. 10

Texas Penal Code Ann. § 43.26(a)(1) (Vernon 1987 Supp.) 10

Utah Code Ann. § 76-5a-3(1)(a) (1987 Supp.) 10

Wash. Rev. Code § 9.68A.070(1) (1987 Supp.) 10

No. 88-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN AND CHARLENE GEEVER,

Appellants,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

Appellee, the People of the State of Illinois, now move this Court to dismiss the appeal brought by appellants because: 1) the judgment appealed from is not a final judgment within the meaning of 28 U.S.C. § 1257; and 2) the appeal does not present a substantial federal question meriting review by this Court.

STATEMENT OF THE CASE

Because appellants' statement of the case omits certain facts necessary to the determination of whether this Court lacks jurisdiction, the following statement is provided by appellee.

On December 12, 1985, a nineteen-count indictment was returned by a grand jury in DuPage County, Illinois, charging appellants with violations of various provisions of the Illinois child pornography statute, *Ill. Rev. Stat.* 1985, ch. 38, par. 11-20.1(a). Counts one through twelve charged appellants with possession of photographs depicting children engaged in acts of oral sex and lewd fondling, in violation of section 11-20.1(a)(2). These are the charges which are the subject of this appeal. Other charges not at issue include indecent liberties with a child [section 11-4(a)(2)], soliciting a child to appear in a pornographic videotape [section 11-20.1(a)(4)], exhibiting harmful material to a child [section 11-21(a)], and conspiracy [section 8-2(a)] to commit child pornography.

Appellants filed a pretrial motion to dismiss the possession charges on the ground that the statute prohibiting possession of child pornography violates the First and Fourteenth Amendments. The motion was granted, and appellee appealed directly to the Illinois Supreme Court. The remaining charges were placed on inactive status pending the outcome of the direct appeal. (C. 86)

The Illinois Supreme Court reversed the trial court's ruling and remanded the case for trial. A petition for rehearing was denied on May 31, 1988. Subsequently, appellants sought and received a stay of the mandate pending disposition of their appeal to this Court. They have yet to be tried on any of the charges in the indictment.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257.

Appellants invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(2). The jurisdiction conferred by § 1257 to review state court decisions is limited to "[f]inal judgments" of the highest state court in which a decision could be had. Generally, the finality requirement precludes review in this Court where further proceedings in the state courts, other than those of a ministerial nature, are ordered by the decision from which appeal is sought. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In criminal cases, a judgment is ordinarily not final within the meaning of § 1257 unless it includes the imposition of a sentence. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *Bateman v. Arizona*, 429 U.S. 1302, 1306 (1976) (Rehnquist, J., Circuit Justice). Here, appellants have not yet been tried, convicted, or sentenced. If the judgment from which they seek to appeal is to be considered final, then it must be found to fit within some exception to the general rule.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized that under certain limited circumstances, state court judgments may be treated as final despite the fact that they are interlocutory in nature. Four categories were identified and described. However, the Court observed that "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date. . ." 420

U.S. at 477. Such is not the case here. In addition to their constitutional challenge to the statute, appellants have challenged, on Fourth Amendment grounds, the validity of the search warrant with which the police entered their house and seized the photographs. (C. 73-74) Although the trial court denied the motion to suppress (C. 82), the validity of the warrant is likely to be an issue on appeal if appellants are convicted. Thus, if this appeal is not dismissed, the risk arises that resolution of the federal questions necessary to a final disposition of this case will be arrived at in piecemeal fashion. *See, e.g., Flynt*, 451 U.S. at 621.

Moreover, this case does not fit within any of the exceptions discussed in *Cox*. The first is described as "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Cited as an example was *Mills v. Alabama*, 384 U.S. 214 (1966), where the defendant had no defense to the criminal charge other than his federal claim. Here, appellants have a number of potential defenses, both federal and non-federal, other than their present claim: they may assert that the photographs do not depict any of the activities described in section 11-20.1(a)(1); they may assert any of the affirmative defenses listed under section 11-20.1(b); and if convicted, they may prevail on appeal on the Fourth Amendment issues raised in their motion to suppress. The result on remand, therefore, is not preordained.

In the second category are cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480.

Again, this is not the case here, since appellants may prevail at trial or on appeal on one of their alternative defenses.

The third category includes cases in which review of the federal claim can only be had at the interlocutory stage, because "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. It is true that if appellants prevail on any of their alternative defenses, the issue they now raise would be moot, but if convicted they would still be able to obtain review in this Court, even if the state courts declined to reconsider what the Illinois Supreme Court has decided. This Court has often taken jurisdiction on certiorari to decide issues determined by the state courts at earlier stages of the proceedings, saying that "our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . ." *Reece v. Georgia*, 350 U.S. 85, 87 (1955). *Accord*, *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982); *Davis v. O'Hara*, 266 U.S. 314, 321 (1924). Thus, the federal claim presented here would be reviewable in this Court following the remand if appellants are convicted and the convictions are affirmed by the state courts.

The fourth and final category is the only one arguably applicable here. It includes cases:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on

> the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483. It is true that if, on remand, appellants prevail on the merits of a non-federal ground, their present claim would be moot. However, reversal of the Illinois Supreme Court would preclude further litigation only on the possession charges. In any case, refusal to grant immediate review would not "seriously erode federal policy."

In the decisions following *Cox* which invoke this exception to the finality requirement, considerations above and beyond the significance of the federal question played an important role in the determination to allow interlocutory review. *See Calder v. Jones*, 465 U.S. 783, 787-788 and n.8 (1984) (federal issue was whether First Amendment considerations effected exercise of *in personam* jurisdiction over out-of-state publisher in defamation action, and if review not granted defendant would have to appear generally and waive jurisdictional defect) and *Shaffer v. Heitner*, 433 U.S. 186, 195 and n.12 (1977) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (California statute nullifying arbitration clause in contract between parties would be reviewed since, if parties forego arbitration and resort to court, federal issue would escape review); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (federal issue collateral to the merits and ripe for review). On the other hand, where, as here, the federal question will survive the remand and

other federal questions may arise following the remand, this Court has postponed review until after the trial on the merits. *See Flynt, supra.*

For these reasons, this Court should dismiss the appeal for want of jurisdiction.

II.

THIS APPEAL FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW IN THIS COURT AT THE PRESENT TIME, BECAUSE THE DECISION BELOW IS CORRECT AND IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER STATE OR FEDERAL COURT.

Appellants assert that *Stanley v. Georgia*, 394 U.S. 557 (1969) controls this case (Jurisdictional Statement at 11), because it holds that while the states are free to regulate the dissemination of speech which is outside the protection of the First Amendment, even unprotected speech is absolutely immune from regulation if it is found in the home. (Jurisdictional Statement at 10) That is not the holding of *Stanley*. The holding of *Stanley* is that the governmental interests which justify regulating the dissemination of obscene materials do not justify criminalization of the private possession of such materials. In reaching that conclusion, this Court employed a balancing test—it identified the interests of the individual that the Georgia statute impacted upon, it considered the justifications for the statute offered by the state, and it determined that the latter were not sufficiently compelling to overcome the former. 394 U.S. at 564-568. The Court noted that its holding was limited, and was not to be construed as foreclosing attempts to criminalize possession of "other types of printed, filmed, or recorded materials." *Id.* at 568, n.11. Later cases have held that *Stanley* is

limited to its facts and is not to be extended. *Bowers v. Hardwick*, 106 S.Ct. 2841, 2846 (1986); *United States v. 12200-ft. Reels of Super 8 m.m. Film*, 413 U.S. 123, 127-128 (1973) (the holding of *Stanley* was "explicitly narrow and precisely delineated", and the Court is "not disposed to extend the precise, carefully limited holding of *Stanley*. . ."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66-68 (1973).

As this Court recognized in *New York v. Ferber*, 458 U.S. 747 (1982), child pornography is unprotected speech, and the governmental interest in regulating it is different from the interest in regulating obscenity. The rationale for regulating obscenity is the "legitimate interest in prohibiting dissemination or exhibition of obscene materials when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller v. California*, 413 U.S. 15, 18-19 (1973). Clearly, this interest is not advanced by a ban on private possession. However, the interest in regulating child pornography has little if anything to do with protecting the unwilling or underaged viewer. It has to do with " 'safeguarding the physical and psychological well-being of a minor' ". *Ferber*, 458 U.S. at 756-757. The *Ferber* opinion catalogues in great detail the physical and emotional harm done to the child who has been used in the production of pornography. 458 U.S. at 758-759 and n.n. 9 and 10. The court below correctly recognized that, while the individual interests at stake here are the same as those asserted in *Stanley*, *see* A-11, the governmental interests are different and more compelling—so much so, that the balance tips in favor of the statute. A-12-14.

Unlike the case with obscenity, where the only danger to the public lies in the unregulated display of the ma-

terials, child pornography causes damage by its very existence. The preservation of a photographic record, for all to see, of a degrading and humiliating event often causes life-long psychological trauma to the child-victim. The Illinois Supreme Court determined that the legislative intent behind section 11-20.1 was "to prevent the sexual abuse and exploitation of children by 'drying up' the market for child pornography", and that a ban on possession was an essential element, necessary "to 'dry up' the final *and most important* link in the chain of distribution of child pornography." A-12-13. (emphasis added).

Appellants argue that the right they are asserting is the right to receive ideas. (Jurisdictional Statement at 9-10) However, the right to receive ideas is not as dramatically affected by section 11-20.1(a)(2) as appellants say it is. The statute prohibits only the possession of "any film, videotape, photograph, or other similar visual reproduction" depicting children actually or by simulation engaged in certain specified sexual acts. It does not prohibit possession, or even dissemination, of books or drawings depicting fictional children in a sexual context, nor does it prohibit possession or dissemination of photographs depicting youthful-appearing adults. It is not directed at the moral content of the pedophile's character. What the statute does is draw a line at the point where satisfaction of the pedophile's aberrant curiosity requires the sexual abuse and exploitation of real children.

Appellants also argue that if this statute is upheld, a step will have been taken down the slippery slope leading ultimately to censorship of sexually oriented materials depicting adults, in the name of protecting them from exploitation. It should not require extended discussion to make the point that the law differentiates between adults and minors in several respects, protecting minors from

the consequences of activities that they are ill-equipped to deal with because of their lack of maturity while leaving adults to fend for themselves.

Besides Illinois, eleven states have laws prohibiting possession of photograph depictions of children engaged in sexual conduct. Ala. Code § 13A-12-192(b) (1984); Ariz. Rev. Stat. Ann. § 13-3553 (1985); Fla. Ann. Stat. § 827.071(4) (1985); Minn. Stat. Ann. § 617.247(4) (1983); Nev. Rev. Stat. Ann. § 200.730 (1986); Ohio Rev. Code Ann. § 2907.322(A)(5) (Baldwin 1986); Okla. Stat. Ann., title 21, § 1021.2 (1987 Supp.); S.D. Codified Laws, title 22-22-23.1 (1987 Supp.); Texas Penal Code Ann. § 43.26(a)(1) (Vernon 1987 Supp.); Utah Code Ann. § 76-5a-3(1)(a) (1987 Supp.); Wash. Rev. Code § 9.68A.070(1) (1987 Supp.). Besides the Illinois Supreme Court, two other state supreme courts have upheld the constitutionality of their statutes against First Amendment challenges based on *Stanley*. *Ex Parte Felton*, 526 So.2d 638 (Ala. 1988); *State v. Meadows*, 28 Ohio St. 2d 43, 503 N.E.2d 697 (1986), *cert. denied*, 107 S.Ct. 1581 (1987). *Cf. In Re Duncan*, 189 Cal. App. 3d 1348, 234 Cal. Rptr. 877, *cert. denied*, 108 S.Ct. 501 (1987) (upholding statute making it unlawful to knowingly develop, duplicate, print, or exchange any film, photograph, videotape, negative or slide depicting child pornography against claim of overbreadth because statute invades *Stanley* zone of privacy). In the three state supreme court decisions, only one, the decision below, contains a dissent, filed by Justice Clark. It is noteworthy that Justice Clark does not agree with appellants' contention that *Stanley* controls this case. Instead, he finds the statute objectionable only because it is not the most narrowly-tailored means of vindicating the asserted state interests, believing that civil lawsuits by traumatized child pornography victims against the possessors of photographs provides an adequate remedy. A-23. It is equally note-

worthy that appellants do not espouse Justice Clark's views. Thus, the state supreme courts which have considered appellants' position have unanimously rejected it, and those decisions are not in conflict with the decisions of any federal court. Accordingly, no substantial federal question is presented, and the appeal should be dismissed.

CONCLUSION

For all the foregoing reasons, appellee respectfully requests that this Court dismiss this appeal.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
DAVID E. BINDI *
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2239

Counsel for the Appellee

* Counsel of Record

Dated: September 30, 1988